

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL GALAVIZ,

Defendant-Appellant.

UNPUBLISHED

May 28, 1996

No. 180354

LC No. 94-009559-FC

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, breaking and entering of a building with intent to commit a larceny, MCL 750.110; MSA 28.305, and being a third habitual offender, MCL 769.12; MSA 28.1084. The jury convicted defendant of one count of first-degree criminal sexual conduct, assault with intent to commit unarmed robbery, MCL 750.88; MSA 28.283, breaking and entering of a building with intent to commit a larceny, and habitual offender, third offense. The trial judge sentenced defendant to concurrent prison terms of fifty to seventy-five years for the first-degree criminal sexual conduct conviction, twenty to thirty years for the assault with intent to commit an unarmed robbery conviction, and twenty to thirty years for the conviction for breaking and entering of a building with intent to commit a larceny. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing.

I

Defendant argues that his right to an impartial jury was infringed when, during the second day of trial, the trial court refused to dismiss a juror who admitted she knew the victim's stepmother. We disagree. If a defendant learns after the jury has been sworn that one of the seated jurors is challengeable, the defendant must establish that he would have challenged for cause or otherwise sought the dismissal of this juror if the truth in question had been revealed during voir dire. *People v Graham*, 84 Mich App 663, 668-669; 270 NW2d 673 (1978). Namely, the defendant must demonstrate actual

bias or prejudice. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Our review of the trial court's supplemental voir dire for the juror in question shows that the juror was merely acquainted with the victim's stepmother because they worked together. Moreover, this juror left this employment before the incident and did not know the victim. Because defendant failed to demonstrate actual bias or prejudice, the trial court did not abuse its discretion when it refused to dismiss the juror in question. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Alternatively, defendant argues that the trial court should have allowed him to use a peremptory challenge to excuse the juror in question. We disagree. A juror cannot be peremptorily challenged after the jury has been sworn. *People v Dolan*, 51 Mich 610, 611; 17 NW 78 (1883). Defendant argues, however, that MCR 6.412 should be interpreted to give the trial court the power to extend peremptory challenges in the given situation. This court rule provides:

On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party. [MCR 6.412(E)(2).]

This Court has specifically determined that such a request must be made before the jury is sworn. *People v Lee*, 212 Mich App 228, 252; 537 NW2d 233 (1995). Thus, the proffered court rule does not change the settled Michigan law that one cannot exercise a peremptory challenge after a jury has been sworn. Consequently, defendant had no right to use any more peremptory challenges at the time of the juror's challenge. Therefore, we find that the trial court committed no error on this point.

II

Defendant argues that his right to counsel was infringed by the trial court's denial of his pro se motion for substitution of counsel. We disagree. An indigent criminal defendant is guaranteed the right of counsel. US Const, Am 6; Const 1963, art 1, § 20. Nevertheless, an indigent defendant is not entitled to the attorney of his choice after he merely requests the trial court to make such a substitution for his original appointed counsel. *People v Johnson*, 144 Mich App 125, 134; 373 NW2d 263 (1985). In order to justify such a substitution, the defendant must show that there is good cause and that the substitution will not unreasonably disrupt the judicial process. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). When confronted with a motion to substitute appointed counsel, the trial court has the duty to hear the defendant's claim "and, if there is a factual dispute, take testimony and state [its] findings and conclusions." *People v Ceteways*, 156 Mich App 108, 118; 410 NW2d 327 (1986).

The trial court held the requisite hearing. Our review of its findings and conclusions reveals that defendant was merely dissatisfied with his attorney's speed in accomplishing certain routine tasks, and not the adequacy of his attorney's representation. Such dissatisfaction is not a ground for substitution so long as the attorney in question is diligent and interested in the defendant's case. See, e.g., *People v Meyers (On Remand)*, 124 Mich App 148, 166; 335 NW2d 189 (1983) (appointed counsel's failure

to heed a defendant's request is not cause for substitution). We are satisfied that defendant's attorney was indeed diligent and interested in his client's case. Correspondingly, the trial court did not abuse its discretion when it denied defendant's request to substitute his appointed counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

III

Defendant argues that in imposing sentence for the first-degree criminal sexual conduct conviction, the trial court impermissibly looked to disciplinary credits when it arrived at this sentence. We agree. At defendant's sentencing, the trial court stated:

In imposing this sentence the Court has taken into consideration the disciplinary credits that you will receive in prison.

As an habitual offender, defendant will not earn disciplinary credits. *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995). Because of this fact, defendant will not be eligible for parole until he serves his minimum sentence, unless the trial judge, or his successor, agrees in writing to the parole. MCL 769.12(3); MSA 28.1084(3). By virtue of these facts, the trial court cannot take such credits into account when calculating a defendant's sentence. *Martinez, supra* at 203. If a trial court does take disciplinary credits into account when passing sentence, the matter must be remanded for resentencing. *Id.* Accordingly, we remand this matter to the trial court so it can resentence defendant without taking the disciplinary credits into account in fashioning a sentence. Because we are remanding for resentencing, it would be premature to address defendant's argument that the sentence is disproportionate. *People v Chesebro*, 206 Mich App 468, 474-475; 522 NW2d 677 (1994).

As guidance to the trial court on remand, we note that the trial court's finding that defendant lacked remorse appears to be based upon defendant's refusal to admit guilt. A trial court cannot use the fact that the defendant refused to admit guilt as a means to increase the severity of a defendant's sentence. *People v Yennoir*, 399 Mich 892; 282 NW2d 920 (1977). Consequently, the trial court must not use this improper consideration when it resentsences defendant.

IV

Defendant argues that his right to counsel was infringed when the trial court removed his trial counsel and appointed a new attorney to represent him at sentencing. We disagree. We note that this issue is unpreserved because defendant failed to object to this substitution. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Nevertheless, appellate review is still appropriate because defendant raised a constitutional challenge to the trial court's action. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994).

If a defendant's attorney is physically incapacitated, the trial court may remove him. *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993). Our review of the record reveals that

there is no doubt that defendant's trial counsel was incapacitated at the time of defendant's sentencing. Because defendant had been convicted of first-degree criminal sexual conduct, the trial court did not have an option to delay sentencing for one year to allow defendant's trial counsel to recover. MCL 771.1(1); MSA 28.1131(1). Consequently, the trial court did not abuse its discretion when it removed defendant's trial counsel and appointed a new attorney in his stead. *Mack, supra* at 14.

We affirm defendant's convictions and remand the matter to the trial court for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald